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Before the
FEDERAL COMMUNICATIONS COMMISSION Federal Communications Commission
Washington, D.C. 20554 Office of Secretary

In the Matter of)
)
Amendment to the Commission's) WT Docket No. 95-157
Regarding a Plan for)
The Costs of Microwave Relocation)

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To: The Commission

REPLY COMMENTS OF
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR"), by its attorneys and pursuant to Section 1.415 of the rules of the Federal Communications Commission ("the Commission"), respectfully submits its Reply Comments in response to the Commission's Further Notice of Proposed Rule Making in the above-referenced proceeding, released April 30, 1996 ("Further Notice").^{1/}

I. BACKGROUND AND PRELIMINARY STATEMENT

AAR addressed several issues in its Comments. It expressed its support for the Commission's proposal to allow incumbents to participate in the cost-sharing plan. AAR noted that there may be circumstances in which incumbents may wish to relocate

1/ First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-196 (April 30, 1996) ("First R & O" or "Further Notice").

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some of their own links to achieve a system-wide relocation. This proposal was supported unanimously by incumbents, and several PCS proponents supported it, too.

AAR also expressed its opposition to the proposal to alter the length of the negotiation periods in the microwave relocation rules. It pointed out that the current relocation regime was working well and that many successful voluntary relocation agreements were being negotiated. AAR's opposition was echoed in the comments of every incumbent and even in the comments of some PCS companies.

II. THE COMMENTS SUPPORT PERMITTING MICROWAVE INCUMBENTS TO PARTICIPATE IN THE COST-SHARING PLAN

In its Comments, AAR supported the proposal to allow microwave incumbents who relocate their own links to seek reimbursement from subsequent PCS licensees who later benefit from such relocation. Microwave incumbents were unanimous in their support of this proposal.^{2/} PCS advocates, on the other hand, were divided in their reaction to this proposal.^{3/}

^{2/} Comments of American Petroleum Institute ("API") at 9-15; Comments of American Public Power Association ("APPA") at 5; Comments of Basin Electric Power Cooperative ("Basin") at 3-4; Comments of East River Electric Power Cooperative ("East River") at 8; Comments of South Carolina Public Safety Service Authority ("Santee Cooper") at 2; Comments of Tenneco Energy ("Tenneco") at 5; Comments of UTC, The Telecommunications Association ("UTC") at 5.

^{3/} BellSouth Corporation ("BellSouth") and Western Wireless Corporation ("WWC") both opposed the proposal. BellSouth Comments at 6; WWC Comments at 5. The Cellular Telecommunications Industry Association ("CTIA"), the Personal Communications Industry Association ("PCIA"), PrimeCo Personal Communications, L.P. ("PrimeCo"), and Sprint Spectrum, L.P. ("Sprint

(continued...)

In order to ensure the continued safe operation of their microwave systems, AAR members wish to conduct contemporaneous, system-wide relocations whenever possible. To accomplish this, an incumbent may be required to self-relocate some of the links in its system. Subsequent PCS licensees who benefit from this band-clearing should be required to reimburse the self-relocating incumbent. AAR agrees with those commenters who stated that allowing incumbent participation in the cost-sharing plan would promote system-wide relocations, consistent with the Commission's goals in crafting the microwave relocation rules.^{4/}

A. Incumbent Microwave Operators Would not Abuse the Cost-Sharing Plan

In the Further Notice, the Commission asked for comment on "how subsequent licensees could be protected from being required to pay a larger amount to an incumbent that relocates itself than to another PCS licensee who has an incentive to minimize expenses."^{5/} Several PCS advocates conditioned their support of the proposal to include incumbents in the cost-sharing plan on the adoption of safeguards

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Spectrum") were skeptical of the inclusion of microwave incumbents in the cost-sharing plan and would support the proposal only if safeguards were imposed to prevent incumbents from abusing the cost-sharing plan. CTIA Comments at 7; PCIA Comments at 4-6; PrimeCo Comments at 5-5; Sprint Spectrum Comments at 5. But see, AT&T Wireless ("AT&T") Comments at 5-6 (supporting the inclusion of incumbents in the cost-sharing plan).

^{4/} APPA Comments at 5; Basin Comments at 3-4; East River Comments at 8; Santee Cooper Comments at 2; UTC Comments at 5; See also First R & O at ¶ 71.

^{5/} Further Notice at ¶ 99.

to prevent abuses by incumbent relocators.^{6/} Others opposed the proposal because they said it would provide no incentive to incumbents to keep relocation costs down and would "create[] perverse incentives for incumbents."^{7/}

These concerns are unfounded and AAR agrees with those commenters who pointed out that the financial risks of self-relocation are sufficient to induce self-relocating incumbents to minimize costs.^{8/} An incumbent who decides to self-relocate links does so with no assurance that it will ever be reimbursed by subsequent PCS licensees for such relocation. At present, the incumbent has no way of knowing which links in its microwave system will be subject to interference from, or interfere with, a future PCS system. It is conceivable that an incumbent which seeks a contemporaneous, system-wide relocation will relocate some links for which it might never be reimbursed.^{9/} Thus, the incumbent will have just as much incentive to minimize the costs of relocation as a PCS licensee.

B. Incumbent Relocators Should Not be Treated as if They Were the Initial PCS Relocator for Purposes of the Cost-Sharing Formula

AAR supports the suggestion that the PCS licensee who would have first interfered with a self-relocated link, rather than the self-relocating incumbent, should be

^{6/} See CTIA Comments at 7; PCIA Comments at 4; PrimeCo Comments at 5-6; Sprint Spectrum Comments at 5.

^{7/} BellSouth Comments at 7; See also WWC Comments at 6; But see AT&T Comments at 5 (AT&T stated that including incumbents would present "little risk of abuse").

^{8/} API Comments at 13; UTC Comments at 7-8.

^{9/} This is especially true for links in rural and remote areas.

treated as the initial relocater for depreciation purposes under the cost-sharing plan.^{10/} The benefit an incumbent receives from self-relocating its own microwave links is very different from that which a PCS licensee receives from relocating links in its service area. The initial PCS relocater realizes a substantial financial benefit and competitive advantage in being first-to-market in the increasingly competitive wireless personal communications industry; the Commission recognized this benefit when it adopted the depreciation factor in the cost sharing formula.^{11/} In contrast, microwave incumbents who self-relocate links receive no corresponding financial benefit or competitive advantage. These incumbents will likely relocate their own links for the important purpose of ensuring the continued safe and reliable operation of their microwave systems in support of essential public safety and emergency services. Thus, the amount paid by an incumbent for the relocation of a link should not be depreciated under the formula because the incumbent gains no financial advantage from self-relocating its link. Incumbents should be reimbursed the entire reasonable cost of the relocation by the subsequent PCS licensee who first benefits from the incumbent's self-relocation.

If the Commission determines that a specific cap on costs for incumbent self-relocation is necessary, AAR would join API in supporting the \$250,000 per link figure adopted in the cost-sharing proceeding, plus \$150,000 for a new tower, if needed.^{12/}

^{10/} See API Comments at 11, 12-13; East River Comments at 9; UTC Comments at 9; Williams Wireless Inc. ("Williams" or "WWI") Comments at 10-11.

^{11/} See First R & O at ¶ 74.

^{12/} API Comments at 13.

AAR also agrees with API that an incumbent's reimbursable transaction costs should not be limited to the two percent limit proposed by the Commission in the First R & Q.^{13/} Instead, all reasonable transaction costs should be reimbursed.

III. THE COMMENTS DID NOT SUPPORT ALTERING THE NEGOTIATION PERIODS

AAR noted in its Comments that there has been no showing in the record of this proceeding that the existing negotiation periods recently adopted by the Commission have been inadequate to promote relocation negotiations between incumbents and PCS licensees. In fact, the record demonstrates that the existing rules have been quite sufficient to promote relocation negotiations and that many successful negotiations have been and are being concluded.^{14/} Having reviewed the comments filed in this proceeding, AAR reiterates its initial position and notes that this position has been bolstered by the comments filed.

Instead of producing any evidence of "abuses" of the rules by microwave incumbents, PCS advocates merely "resurrect[ed] their shop-worn and exaggerated claims that incumbents are abusing the current voluntary negotiation period."^{15/} Omnipoint accused incumbents of "significantly abusing the voluntary relocation

^{13/} Id. at 14-15.

^{14/} AAR notes that two PCS licensees, BellSouth and PrimeCo, urged the Commission not to alter the negotiation periods. BellSouth Comments at 2; PrimeCo Comments at 4. PrimeCo stated that the existing rules have worked well and there has been no showing that they have been insufficient to promote relocation agreements. PrimeCo Comments at 4.

^{15/} APCO Comments at 6.

process" and of "holding up the commercial deployment of PCS with the threat of significant delay." ^{16/} AT&T accused "some incumbent microwave licensees [of] exploit[ing] the voluntary period by using the threat of delay to extract higher relocation fees."^{17/} PCIA continued to allege that incumbents are "abusing" the negotiation process and stated that "the additional voluntary period affords [incumbents] no material protection, it merely provides the opportunity to extract premiums above the relocation costs for an 'early' exit."^{18/}

None of these commenters cited any specific examples of alleged "abuses" by incumbents. In fact, PCIA noted that "many negotiations and relocations are proceeding as anticipated" while it alleged that only "a number" of incumbents have allegedly "abused" the relocation rules.^{19/} The Commission also noted in the First R & O that "many voluntary agreements have already been reached or are now being negotiated between A and B block licensees and incumbents."^{20/} While AAR members have been cooperative with PCS licensees and desire to consummate expeditious and mutually beneficial relocation negotiations, it should be noted that, by

^{16/} Omnipoint Comments at 1.

^{17/} AT&T Comments at 2.

^{18/} PCIA Comments at 3.

^{19/} PCIA Comments at 2 (emphasis added).

^{20/} First R & O at ¶ 13 (emphasis added).

definition, an incumbent cannot "abuse" the microwave relocation rules until the conclusion of the voluntary period.^{21/}

Assuming arguendo, that any "abuses" do occur, the proper remedy would be to make a formal complaint to the Commission, not to punish all incumbents by altering the recently adopted relocation rules which were carefully crafted by both incumbents and PCS advocates in an extensive rulemaking proceeding. Radically changing the rules at this time to remedy the alleged "abuses" of only a few incumbents is grossly unfair to the vast majority of incumbents who have entered or will enter relocation negotiations with PCS licensees voluntarily.

AAR's member railroads are currently conducting relocation negotiations with PCS licensees. A number of these negotiations did not begin until some time after the beginning of the voluntary negotiation period for the A and B block PCS licensees. As AAR noted in its Comments, some AAR members were not contacted by PCS licensees until well after the beginning of the negotiation period. In other instances, AAR members have needed sufficient time to evaluate their relocation needs and to analyze replacement systems before entering into relocation negotiations.

Due to the complexities and intricacies of railroad microwave systems and their vital public safety functions, incumbents cannot rush the microwave relocation process. Careful planning is required to ensure the continued integrity of these vital communications networks. As pointed out by API, even before incumbents and PCS

^{21/} New Section 101.71 of the Commission's Rules provides that "[d]uring the two or three year voluntary negotiation period, negotiations are strictly voluntary and are not defined by any parameters." Section 101.71 (emphasis added).

licensees sit down to negotiate relocation agreements, they must spend months analyzing their respective needs. One year is insufficient to allow the parties to conduct this extensive analysis and conclude truly voluntary relocation agreements. The two-year voluntary negotiation period is necessary to resolve the "myriad issues involved with such a complex undertaking as systematic relocation."^{22/}

Some PCS entities urged the Commission to abolish the voluntary period, arguing that it served no purpose other than allowing incumbents to "extort" premium payments from PCS licensees. Typical of these comments was AT&T's statement that "[t]he need for the voluntary period at all is questionable at best, since incumbent licensees are adequately protected by the Commission's requirements that PCS licensees must bear all the costs of relocation, and ensure that substitute facilities are comparable to the preexisting facilities in communications through-put, reliability and operating costs."^{23/} Notwithstanding the concerns AAR has with the rules adopted by the Commission in the First R & O concerning what constitutes comparable facilities and other issues,^{24/} AAR also has grave concerns that some PCS advocates are encouraging the Commission to remove all natural market mechanisms from the relocation negotiation process and replace them with heavy-handed, government-mandated negotiation procedures. In an era of less government regulation and more

^{22/} API Comments at 4.

^{23/} AT&T Comments at 2-3.

^{24/} These concerns will be addressed in a timely Petition for Reconsideration and/or Clarification.

reliance on competitive marketplace forces, these PCS licensees are urging the Commission in precisely the wrong direction.^{25/}

Several PCS advocates urged the Commission to shorten the voluntary negotiation period to one year, arguing that this would accelerate relocations and the development of PCS.^{26/} AAR agrees with API that this modification may have the opposite effect and would actually delay many potential relocation negotiations. A one year voluntary negotiation period will take away much of an incumbent's incentive to agree to an early relocation arrangement. Similarly, PCS licensees may simply wait until the end of the one year period and then apply the more coercive measures of the mandatory negotiation period. Neither party would have an incentive to agree to early relocation agreements.

IV CONCLUSION

For the foregoing reasons and for the reasons set forth in AAR's Comments filed on May 28, 1996 in this proceeding, AAR urges the Commission not to alter the length of either the voluntary or mandatory relocation period in its microwave relocation rules. As demonstrated by AAR and other commenters, a two year


^{25/} Apparently, these PCS licensees feel that their "right" to immediate access to spectrum outweighs an incumbent's freedom to contract. This is particularly ironic since only two commercial PCS systems are currently in operation in the United States some fifteen months after the conclusion of the A and B block PCS auction and only one of these was an auction-awarded license. See WWC Comments at 1.

^{26/} AT&T Comments at 2; CTIA Comments at 3; PCIA Comments at 2; Omnipoint Comments at 1-3; Sprint Spectrum Comments at 6; WWC Comments at 4.

voluntary negotiation period is necessary for incumbents and PCS licensees to resolve the complex issues associated with system-wide relocations. AAR also urges the Commission to allow microwave incumbents to participate in the cost-sharing plan for reimbursement from PCS licensees for those links that incumbents self-relocate. This would both facilitate system-wide relocations and expedite the deployment of PCS to the public.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Tina Harris, a secretary with the law firm of Verner, Lipfert, Bernhard, McPherson and Hand, hereby certify that on this 7th day of June, 1996, a copy of Reply Comments of the Association of American Railroads was mailed, first class postage prepaid to the following:

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